



UNITED STATES MARINE CORPS

4TH MARINE DIVISION
MARINE FORCES RESERVE
2000 OPELOUSAS AVENUE
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5000-82
SJA
17 Feb 21

MEMORANDUM FOR THE RECORD

From: Commanding Legal Advisor, 4th Marine Division
To: Files

Subj: FACTS AND CIRCUMSTANCES SURROUNDING SUBSTANCE ABUSE IN THE
CASE OF PRIVATE JEFFREY W. BENWAY 1538126922/2131 USMC

1. Probable Cause for Urinalysis. On 19 May 2020 at about 1045, Private Jeffrey Benway, USMC, was found passed out on his keyboard at his workstation. He was then directed by the 5th Battalion, 14 Marine Regiment (5/14) Sergeant Major to standby for a urinalysis. However, prior to the conduct of the urinalysis, the 5/14 Inspector-Instructor (I-I) was made fully aware of the situation and adopted the Sergeant Major's direction to conduct a urinalysis as his own, under his own command authority. Therefore, this urinalysis was directed with proper command authority.

2. Urinalysis Testing Code. The urine sample collected from Private Benway on 19 May 2020 was processed by a certified Air Force Forensic Toxicology Lab. There are no indicators in the lab report as to the testing code which served as the basis for the urinalysis. The Substance Abuse Counseling Officer for 5/14 confirmed that, to his knowledge, no drug testing code was provided or inputted into any drug testing software or system. Although not documented, the 5/14 I-I stated he had two purposes for ordering the urinalysis. The first purpose was a probable cause search to determine if drugs were in Private Benway's system, in violation of UCMJ Art 112a (Use of a Controlled Substance). The second purpose was to determine if Private Benway was medically fit to perform his duties. While ordering a urinalysis for two different purposes seems unconventional due to current urinalysis system testing code input constraints (only allows one code); having multiple purposes for directing a urinalysis is more in-line with commanders' common concerns and inquiries when presented with possible drug use. Additionally, there is no regulation which I am aware of that prohibits citing multiple testing codes or reasons for directing a urinalysis. Therefore, based on the 5/14 I-I's explanation of his intents and purposes, he lawfully directed a probable cause urinalysis, and the results of that urinalysis were therefore permitted to be used as evidence for Nonjudicial Punishment (NJP) and for purposes of characterization of service for Private Benway's follow-on administrative separation proceedings.

3. Independent evidence from urinalysis results. The urinalysis results reflected Private Benway had a controlled substance (benzoylecgonine) in his system. However, the 5/14 I-I also determined drug abuse occurred based on Private Benway's observed altered physical and mental state, which included being disheveled, mentally disoriented, and asleep at his desk.

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Private Benway also admitted to violating UCMJ Article 112a at his NJP, and only did so after consulting with a military defense counsel from the Camp Pendleton Defense Services Organization.

4. NJP. On 10 July 2020, the 5/14 I-I conducted NJP for Private Benway and he admitted (pled guilty) at NJP to using a controlled substance. Private Benway circled that he did not intend to appeal the NJP in Block 12 of NAVMC 10132 or the Unit Punishment Book (UPB) on 10 July 2020. Manual for Court-Martial (MCM) (2019 ed.), Part V, Paragraph 7d states, "An appeal shall be submitted within 5 days of imposition of punishment, or the right to appeal shall be waived in the absence of good cause shown." 5 days from the date of NJP would have been 15 July 2020.

5. NJP Appeal. Private Benway, via his civilian attorney representative, Ms. Bethany L. Peyton-O'Brien, filed an NJP appeal on 15 October 2020 (3 months after the date of NJP). The appeal was submitted to the 5/14 I-I. The 5/14 I-I then properly routed the appeal to me as the 4th Marine Division Command Legal Advisor, pursuant to MCM (2019 ed.), Part V, Paragraph 7e. I conducted the above inquiry into the underlying facts and decisions surrounding the urinalysis and NJP. Based on the above information, I determined that the urinalysis results were properly admissible for Private Benway's NJP and that the NJP and its associated punishment were authorized. After this legal review, the NJP appeal was provided to the 14th Marine Regiment Commanding Officer (CO) for his decision as the NJP Appellate Authority. Based on the untimely NJP appeal and the lack of good cause, the 14th Marine Regiment CO denied the NJP appeal. Due to the fact the NJP appeal was submitted 3 months after the date of NJP and the UPB had already been placed in Private Benway's Official Military Personnel File, no additional comments were placed in the UPB to reflect the NJP denial. This memorandum for the record now serves to formally capture the denial of Private Benway's NJP Appeal by the 14th Marine Regiment CO and the reasons supporting its denial.

6. Affidavit. The information provided in this memorandum for the record is true and accurate to the best of my knowledge.

7. Point of Contact. I am on the point of contact for this matter and can be reached at (504) 697-8369 or john.aaron@usmc.mil.



J. H. AARON